United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

6-9-69
(1)

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

612

No. 22,225

DANIEL PORTER, Jr.

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Court of Appeals for the
District of Columbia Circuit.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is it error for the trial judge to fail to declare a mistrial, sua sponte, where improper and highly inflammatory evidence is introduced to the petit jury?

2. On rebuttal, may the prosecution introduce evidence for purposes of impeachment which evidence is outside the issues of the pleadings?

3. Is a sentence purportedly under §18 USC 5010(c), a valid sentence in the absence of a judicial finding that the "youth offender may not be able to derive maximum benefit from treatment by the Youth Corrections Division prior to the expiration of six years from date of conviction"?

4. May Congress validly prescribe a maximum punishment of fifteen years for conduct without regard to mens rea?

5. In the case of plainly erroneous instructions to the jury, must an appellant show prejudice over and above the denial of his right to a jury trial of the factual issues?

(a) Assuming that the evidence overwhelmingly shows a defendant to have been a principal in the first degree (perpetrator), may the trial judge properly instruct the jurors that a verdict of guilty may be returned even in the absence of evidence of guilt of the perpetrator, in case the jurors should find that defendant was not the perpetrator?

(b) May a defendant be convicted as an accessory where the indictment charges him as principal?

(c) Assuming that the evidence overwhelmingly shows the taking to have been against complainant's will, may the trial judge instruct the jury that the complainant's awareness of the taking is irrelevant?

(d) Is it prejudicial error for the trial judge to fail to instruct the jurors that it is their duty to determine the truth or falsity of the facts found by the grand jury?

6. Is it error to enter a judgment of conviction on a verdict of "guilty as charged", when there is doubt as to whether the jurors intended "as charged by the trial judge" or "as charged by the grand jury?"

7. Is it error for the trial judge to fail to declare a mistrial, sua sponte, because of ineffective assistance of counsel where trial defense attorney actively cross examined his client, where trail defense attorney failed to challenge the array, failed to conduct any voir dire, failed to make one of numerous available objections to the questions asked by the U.S. Attorney and to the trial judge's instructions, and failed to move to strike improper evidence, and where he urged the jury to give defendant his just desserts. This Case has not been heard before the U.S. Court of Appeals DC.

STATEMENT OF THE CASE

A Grand Jury returned an indictment in the words and figures following, to wit:

> "On or about November 12, 1967, within the District of Columbia, Irving Haltiwanger and Daniel Porter, Jr., by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Thomas H. Wharton, property of Thomas H. Wharton, of the value of about $24.60, consisting of a billfold of the value of about $15.00, a change carrier of the value of about $1.00 and about $8.60 in money."

On opening statement to the petit jury, the U.S. Attorney stated in relevant part as follows:..."When we have shown you these facts, we will then at the appropriate time request that you return a verdict of guilty as indicted."(T-16) Emphasis supplied.

Thomas H. Wharton testified on direct during the prosecution's case in chief, in substance, that on November 12, 1967, in the District of Columbia, two persons forcibly removed his billfold containing $8.00, and a money changer containing fifty cents. The billfold was recovered near the place where it had been removed. (T-17-26)

Forman Leslie Williams testified on direct during the prosecution's case in chief, in substance that on November 12, 1967, he saw two men forcibly remove a wallet and a change carrier from the person of Thomas H. Wharton, and that he recognized the defendant Daniel Porter Jr., as one of those two men. (T 32, 33).

Daniel Porter, Jr. testified on direct for the defense in chief, in substance that he was in the Broadway Theater on 7th Street N.W., from about 1:30 PM to 11:00 PM on November 12, 1967. and that the movie was "Valley of the Dolls".

On cross examination, it was stipulated between the U. S. Attorney and trial defense attorney that Mr. Porter first learned on November 17, 1967, that he was charged with the crime charged in the indictment. (T-75). The agreement to stipulate was made at a bench conference, in Mr. Porter's absence. Mr. Porter was not asked if he consented to the stipulation. The record reflects that it is likely that he did not even know that the stipulation was to be stated to the jurors until it had been so stated.

On rebuttal, Mr. Aaron Hunter testified on direct, that he was one of the supervisors of a chain of theaters, which chain included the Broadway Theater, 1500 block of 7th Street. His testimony is extracted in relevant part as follows:

Q "Mr. Hunter, at my request, over the lunch hour, did you bring with you a document which is kept in the ordinary course of your group of theater's business?

A Yes, sir.

Q And what does that document reflect, sir?

A This is for '67, November 11.

Q Does it reflect the date of November 12, 1967?

A Sir?

Q What is that sheet that you have? Before we get to the date, tell the Court and jury what is that?

A This is a record kept by the bookkeeping department at our office at 3313 14th Street, Northwest.

Q Does it show, sir, what movies were playing at what theaters in your chain on the date of November 12, 1967?

A Yes, it does.

Q Incidentally, sir, does that record show what movie was playing at the Broadway Theater on the date of November the 12th, 1967?

A Yes, it does.

Q Would you mind telling us the title of the movie or movies that were playing there on that day, sir?

A The weekend of the 11th through the 18th, '67--on the 11th and the 12th was Wild Rebel and Blues for Lovers."
(T 81, 82).

In summation, the U. S. Attorney argued to the jurors in relevant part as follows:

"So the question of when he first knew about the date on which he was being charged became important and that is why the stipulation was made that it was the 17th of November that he became aware of the date on which he was being charged with this offense. In other words, he knew then that the offense with which he was charged was to have occurred on November 12. It is five days later. So that is why he remembered that particular Sunday. It had only been five days before, you see. He had a chance to reflect." (T-87).

On summation, the U. S. Attorney failed and neglected to demand a verdict of guilty as indicted, as he had promised to do in his opening statement.

The entire summation by trial defense attorney was in the words and figures following, to wit:

"May it please the Court, ladies and gentlemen of the jury, it would appear that I have quite a burden. I am going to make my summation rather brief. I shall not comment on the evidence. I shall not characterize any of the witnesses nor any of the testimony. I shall make it just as brief as I possibly can and say this, which I have said before to many juries in similar circumstances.

When you took your seats in the jury box at the commencement of this case, the Judge told you, among other things, that it was his function to conduct this trial in an efficient and an orderly fashion, words to that effect. So that is the Court's obligation.

The obligation of the prosecutor, as has been so well put in the language of many learned justices, is to see that justice is done.

True, as my learned adversary has said, it is the duty of counsel for both sides to seek the truth, and that is all I am interested in, too.

Considering what, for what of a better term I say, little we have had to work with in this particular case, just the young man, it is true, and the Defendant, your task should not be difficult. All I ask you to do is this: Don't go back to the jury room and immediately seize upon a conclusion that this Defendant must be guilty without weighing all of the evidence. Considering all of the testimony, true, considering the demeanor of the witnesses who testified, and obviously taking it as true without any further reflection that certainly this complaining witness was robbed. There is no question about that.

It is just a question, I agree with counsel, of who you are going to believe. Now, if you don't want to believe this Defendant and you choose not to do so, I want to be the first one to tell you, ladies and gentlemen of the jury, that you will not have violated your trust nor will you have shirked your responsibility. That is for you to decide, who you shall believe.

Again I say I am not going to characterize the testimony of this young man. I think I would be less than an advocate and a member of this Bar were I even persuaded to do so in any respect.

"I leave it to your own good judgment in this matter. Give this young man his just desserts, that is all I ask you to do. In the language of one of my closest friends who is now a member of this Court, simple justice. That is all.

Thank you, Your Honor." (T-91-93) (Emphasis supplied.)

The trial judge instructed the jurors in relevant part as follows:

"Now in this instance the Defendant is indicted for robbery and I wish to discuss with you the essential elements of the offense of robbery, each of which the Government must prove beyond a reasonable doubt. These are, first, that the Defendant took property of some value from the complainant against the will of the complainant; and secondly, that the Defendant took possession of such property by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting the complainant in fear; and, third, that the Defendant took possession of such property from the person or immediate actual possession of the complainant; and fourth, that after having so taken the property, the Defendant carried it away; and fifth, that the Defendant took such property and carried it away without right to do so and with specific intent to steal it.

To establish the first essential element of the offense, it is necessary that there have been such a taking that the Defendant acquired possession of the property enabling him to exercise actual control over it. It is necessary that the property, the possession of which was taken, have had some value at the time of taking. The size of its worth is immaterial, however, and proof of a specific pecuniary value is not required. It is also necessary that the taking of possession of the property have been made against the will of the complainant. The offense is not committed where the property is taken with the full knowledge and consent of the owner of one authorized to consent on his behalf.

To establish the second element of the offense, it is necessary that the possession of such property have been taken by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear. It is not sufficient merely that the Defendant acquired possession of the property. He must have acquired possession by force or violence. If the possession was acquired by actual force or physical violence against the person of the complainant sufficient to overcome or prevent his resistance, the requirement of force or violence is satisfied. If the possession was acquired by putting the complainant in fear without employment of actual force or violence against his person, the requirement of force or violence is satisfied if the transaction was attended with circumstances such as threats or words or gestures as in common experience are likely to create a reasonable apprehension of danger and induce a man to part with his property for the sake of his person. If the possession was acquired by sudden or stealthy seizure or snatching, the requirement of force or violence is satisfied if the Defendant exercised sufficient force to accomplish the actual physical taking of the property from the person of the complainant even though it was taken without the complainant's knowledge and even though the property was unattached to his person.

.....

"To establish the fifth element, it is necessary that the property was so taken and carried away by the Defendant without right to do so and with specific intent to steal it. At the time of taking and carrying the property away, the Defendant must have had the specific intent to deprive the complainant of his property and to convert and appropriate it to the use and benefit of the taker.

.....

You may find the Defendant guilty of the crime charged in the indictment without finding that he, personally, committed each of the acts constituting the offense or that he was personally present at the commission of the offense.

Any person who advises, incites or connives at an offense or aids or abets the principal offender is punishable as a principal. That is, he is as guilty of the offense as if he had personally committed each of the acts constituting the offense.

A person aids and abets another in commission of a crime if he knowingly associates himself in some way with a criminal venture with the intent to commit the crime, participates in it as something he wishes to bring about, and seeks by some action of his to make it succeed." (T-99-103) Emphasis supplied.

The trial judge failed and neglected to instruct the jurors that it was their duty to determine the truth or falsity of the facts found (charged) by the Grand Jury. On eight separate occasions, all at points of strategic listener involvement, the trial judge referred to his instructions as "the charge".

The petit jury returned a verdict in the words and figures following, to wit:

"We say the defendant is guilty as charged." (T-109)

There was no evidence in support of the Grand Jury's finding that the billfold was worth $15.00, or that the change carrier was worth $1.00; nor was there any evidence that these items had any value.

During the progress of the trial, trial defense attorney failed and neglected to make one objection either to the questions of the U. S. Attorney or to the instructions of the trial judge. He failed and neglected to move to strike any of the evidence. He failed and neglected to submit any proposed instructions to the judge for submission to the jury. He failed and neglected to conduct any voir dire of the jurors, and failed and neglected to inquire of the bailiff as to how he obtained the jurors.

The judgment of conviction reads in relevant part as follows, to wit:

> "It is adjudged that the defendant has been convicted upon his plea of Not Guilty and a verdict of guilty of the offense of Robbery--Title 22, District of Columbia Code, §2901....It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative pursuant to Title 18, United States Code, §5010(c) (Federal Youth Corrections Act) for a period of Eight (8) Years." (R-15)

ARGUMENT

I. TRIAL JUDGE ABUSED DISCRETION IN FAILING TO DECLARE MISTRIAL, SUA SPONTE, UPON ADMISSION INTO EVIDENCE OF IMPROPER EVIDENCE, WHICH EVIDENCE WAS HIGHLY INFLAMMATORY AND PREJUDICIAL

Defendant, on direct was cross examined by his attorney as to the name of the movie playing at the theater where Defendant had stated his presence at the time of the offense. Defendant stated that the name of the movie was "Valley of the Dolls". On rebuttal, the U. S. Attorney called one of the supervisors of the chain which chain included the theater where Defendant had stated his presence at the time of the offense. The supervisor was asked to read from a document; the supervisor read from the document words which indicated that the names of the movies playing at the theater where Defendant had stated his presence, were "Wild Rebel," and "Blues for Lovers". The document was not properly authenticated as a business record (28 USC 2732), nor did the supervisor state that he had any independent recollection of the name(s) of the movie being shown in the theater at the date and time of the offense.

Notwithstanding the improper authentication of the testimony, it is clear that even properly authenticated testimony as to the name of the movie(s) actually being shown on November 12, 1967, was inadmissible as irrelevant. (Ewing v. U.S. 135 F.2d 633, 77 US App. DC 14 (1942).

The language of this Court in Ewing, to include the footnotes, is set out in relevant part as follows:

> "The objection that the cross-examination related to collateral matter and therefore the Government was bound by Miss Chamberlin's answers was presented to the trial court on the motion for a new trial. In this respect it

"said: 'The statements about which Miss Chamberlin was questioned, and as to which Mrs. Chamberlin testified were clearly inconsistent with the testimony which Miss Chamberlin gave respecting actions of the defendant at the time of the alleged offense. Furthermore, such statements can have no meaning other than could as well be expressed by the words, "Even though I believe him to be guilty, he is facing the electric chair, and I have got to be on his side." It is clearly recognized that inquiries on cross-examination as to the bias of a witness are not irrelevant to the issue in the sense that the cross-examiner is concluded by the answer. It is difficult to think of evidence more relevant to the question of bias, for the purpose of the impeachment of a witness, than the testimony here in question.'

The ruling was correct. It is true, as appellant contends, that generally the inquiring party is concluded by the witness' answer when cross-examination relates to a matter collateral to the issues, and he may not later rebut it for purposes of impeachment. (6) It is also true, as the Government urges, that a witness may be cross-examined as to facts tending to show bias for or against a party, or his willingness to be unscrupulous in giving testimony, for impeachment purposes, (7) that bias may be shown by extra-judicial statements of the witness from which an inference as to his feelings toward a party may be drawn, (8) and by extrinsic evidence independently of cross-examination; (9) and that the witness may be contradicted if he denies having made such a statement. (10)

The respective contentions, stated thus abstractly, present an apparent paradox. Each contains an ambiguity with reference to the other. Under the prosecution's view, if the matter inquired about shows bias or prejudice, the fact it is collateral is immaterial. Under appellant's, if the matter is collateral, the cross-examiner is concluded by the answer, regardless of whether the subject matter relates to the witness' bias or prejudice. In this formulation, the rules conflict.

The difficulty is with the formulation, more particularly of appellant's viewpoint. The commonly accepted broad statement on the rule is: 'No contradiction shall be permitted on "collateral" matters. Cr. 1 Starkie, Evidence (1824) 190; 3 Wigmore, Evidence (ed ed. 1940) §§1003, 1020. But as the latter authority points out the term "collateral" furnishes no real test; without more, it is a "mere epithet," a catch all designation to cover specific illustrations based upon "idiosyncracies of individual opinion." (11) Without further pinning down, it can mean no more than the matter inquired about is not logically relevant, independently of "pure" impeachment, to the issues or cause on trial or is so only in so remote and indirect a manner that the authoritative tribunal thinks it should not be inquired in a case of contradiction by extrinsic testimony, or, in one of self-contradiction, further than to make inquiry of the witness. (12) Logically, it would seem, if the test is one of "collateralness in fact," it should be the same for both cases. But whether so or not, the apparently prevailing approach is "to invoke simply the term "collateral," and to decide according to the circumstances of each case.' (13)

However, since Attorney General v. Hitchcock, 1 Exch. 91,99 (1847), (14) the test in England and in the better considered American cases (15) has been reduced to more

"definite and less idiosyncratic form. This is, as Wigmore phrases it, for cases of contradiction by extrinsic evidence. 'Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?'; for cases of self-contradiction, 'Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence foe any purpose independently of the self-contradiction?' 3 Evidence (3rd Ed., 1940) 657, 692.

In the present case, we think it is immaterial which of these formulations is applied, since the facts concerning which the complaining witness' mother testified could have been proven under either, not to make out part of the Government's case in chief before Miss Chamberlin testified, but afterward because those facts, if true, not only went to impeach her veracity generally or credibility in relation to some matter not directly involved in the issues, but to destroy everything she had said as a witness in appellant's behalf and as well to contradict his own testimony as to the most crucial fact in the case. (16) But for possible objections on technical grounds, noted later, the impeaching witness might have been called to prove what she related, even though Miss Chamberlin had not been questioned about it. However, since the question arose actually as a matter, in the first place, of self-contradiction, the latter formulation of the rule is the properly applicable one.

To make the application clear, it is necessary to point out a common misconception, in which appellant indulges. It has been stated as follows: 'Moreover, the rule is often misunderstood. Courts are found phrasing the test of admissibility in this way. Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea? or "Whether the question, the answer to which is proposed to be contradicted, would be admissible if proposed by the party calling him? These are accurate enough as far as they got; but they omit to provide for an important class of matter clearly admissible, namely, facts relating to the bias, corruption, or other specific deficiencies of the witness. It is not merely matters which are a 'part of the case' that may be the subject of self contradiction, but any matter which would have been otherwise admissible in evidence. The simple test is (in the language of Chief Baron Pollock) whether it concerns 'a matter which you would be allowed on your part to prove in evidence' independently of the self-contradiction, i.e., if the witness had said nothing on the subject. 3 Wigmore §1020 (17).

(6) 3 Wigmore, Evidence (3d Ed. 1940), and authorities cited in note 3; Thomas-Starrett Co. v. Warren, 1912, 38 App. D.C. 310, 315; Cf. Martin v. U.S., 1942, 75 USApp D.C. 399, 127 F 2d 865.

(7) Alford v. United States, 1931, 282 US 687, 693, 51 S Ct 218, 75 L Ed 624; District of Columbia v. Clawans, 1937, 300 US 617, 630, 57 S Ct 660, 81 L Ed 843; U.S. v. Glasser, 7 Cr., 1940, 116 F 2d 690, 702, reversed on other grounds, 942, 315 US 60, 62 S Ct. 457, L Ed. 680; Economon v. Barry-Pate Motor Co., 1925, 55 App. D.C. 143, 144, 3 F 2d 84, 85; 3 Wigmore §1022; 3 Wharton, Criminal Evidence (11th Ed., 1935) §1346; Underhill, Criminal Evidence (4th Ed. 1935) §401, at 810.

(8) Attorney General v. Hitchcock, 1947, 1 Exch. 91, 100, 154 Eng. Rep. 38, 42; Hoagland v. Canfield, CCSCNY 1908, 160 F 146, 170; 3 Wigmore §948 ff.

(9) United States v. Schindler, CCSCNY 1880, 10 F 547, 549; Hoagland v. Canfield, CCSCNY 1908, 160 F 146, 170; Jones, Evidence (4th Ed., 1938) §828, 845; 3 Wigmore §948.

(10) Ibid.

"(11) He also notes that some courts use the terms 'material' or 'relegant' rather than 'collateral', to indicate the matters that may be the subject of 'prior self contradiction;' but that all these terms are subject, without more, to the infirmity of being 'too indefinite to be useful.' §1020, at 692.

(12) 3 Wigmore §1023.

(13) Id. §1003, note 3, and authorities cited.

(14) 'It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness' testimony.'

(15) See authorities cited in 3 Wigmore §1003, note 2; §1021, note 1.

(16) See Kidwell v. US 1912, 38 App. D.C. 566, 571: 'While it is true that it is material whether or not the prosecutrix had sexual intercourse with men other than defendant, if defendant was also guilty, yet, if evidence had been admitted tending to prove this fact in this particular case, it would have amounted to more than an attempt to impeach her testimony upon a collateral point. It would have extended to facts which materially corroborated prosecutrix's testimony'.

(17) The author also notes another misconception, that nothing said on examination in chief can be collateral and therefore self-contradiction can be had of any part of it.

Ewing v. U.S., 135 F 2d 633, 77 US App. DC 14 (1942)."

The simple test announced by this Court in Ewing is "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?" Applying the simple test announced by this Court in Ewing, to the facts in the instant case, it is clear that the names of the movies being displayed in a certain theater on a certain day, would not be admissible for any purpose. The fact that the issue as to what movie was playing was introduced by trial defense counsel on direct examination of the Defendant, cannot be relied upon to render the rebuttal evidence relevant. Footnote 17, Ewing, supra.

It follows that the jury was tainted by highly inflammatory and prejudicial matter. The jurors may have thought Defendant's testimony to have been a fabrication, but, considering this testimony by the supervisor, they were now told beyond all doubt that Defendant's tale was a fabrication. The testimony was of such impact that its reception could not have been cured by a

cautionary instruction by the trial judge. Such an error cannot possibly be waived by Defendant or by the failure of his counsel to object. Killilea v. U. S., U.S. 287 F 2d 212 (1960); U.S. v. Gori, 282 F 2d 43, aff'd 367 US 364, 81 S Ct. 1523, 6 L Ed 2d 901.

At Killilea, supra, the trial court ordered a mistrial over Defendant's objections. The Court of Appeals stated in relevant part as follows:

> "But we have grave doubts whether a defendant could bindingly elect to be tried by a jury substantially infected by prejudicial exposure or by one of demonstrated indifference to its judicial obligations, any more than he could assent to the toss of a coin or the throw of a card. As we cannot say that the court here could not properly have concluded that trial by this infected jury had been converted from a traverse to a travesty, we hold that a mistrial and second trial did not subject defendant to a second jeopardy in violation of the Fifth Amendment."

Accordingly, it follows that in the instant case, the trial judge abused his discretion by failing to declare a mistrial, sua sponte.

II. JUDGMENT OF CONVICTION AND SENTENCE UNDER 18 USC 5010(c) WHICH JUDGMENT DOES NOT RECITE FINDINGS IN THE LANGUAGE OF THE STATUTE, AND WHICH FINDING IF IT HAD BEEN MADE, WOULD HAVE BEEN UNSUPPORTED BY ANY EVIDENCE, IS VOID.

18 USC 5010(c) reads as follows:

> "(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5018(d) of this chapter."

Counsel has been provided a copy of the transcript of proceedings before the petit jury; he has not been provided a copy of the proceedings before the court on sentence. Inasmuch as the available transcript contains numerous errors of substance, any one or more of which requires reversal, counsel has not chosen to apply for a transcript of the hearing or sentence to be printed at government expense. The judge's order denying bail pending appeal does state that the trial judge had available to him evidence of prior misconduct by the Defendant several years ago as a juvenile. The reliability of this evidence has not

been tested by cross examination or rebuttal testimony. This court can judicially note the secrecy appurtenant to the report of the probation officer to the trial court.

Appellant submits that it is error in any case for a trial judge to rely upon ex parte evidence in reaching a decision or sentence. Appellant submits that it is even graver when sentence is imposed under 5010(c), inasmuch as 5010(c) requires that a sentence thereunder be conditioned upon a finding that the youth offender may not be able to derive maximum benefit from treatment by the Youth Corrections Division of the Board of Parole prior to the expiration of six years.

There being no finding that the Defendant might not be able to derive maximum benefit from treatment by the Youth Corrections Division of the Board of Parole prior to the expiration of six years, there being no evidence in the record to support such finding, the sentence is void. Weaver v. U.S., U.S. App. D.C. #22172, October 4, 1968.

III. THE STATUTE IS UNCONSTITUTIONAL

The validity of the judgment of conviction depends upon the validity of 22 DC Code 2901, which reads in full as follows:

> "§22-2901. Robbery. Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years."

The plain unambiguous intent of Congress, in enacting this bill, was to eliminate mens rea, i.e., the intent to steal, as an element of the offense, and to preclude the assertion of lack thereof by Defendants. The legislature apparently felt that such questions so delicate and complex were beyond the comprehension of most jurors; that jurors should not be suffered to be misled by unscrupulous defense counsel who might deliberately try to confuse the jurors with this issue; and that the issue could best be resolved as an administrative matter by the U. S. Attorney, who with his superior skills, was better qualified to determine the issue of intent to steal, and nol pros any case in

which he found no intent to steal. It is clear that the Congress intended that the U. S. Attorney's determination that there was an intent to steal, was a determination that was not to be subject to review by a juror or by a judge.

Attention is also invited to the fact that the Congress also eliminated the actual present ability to carry out the threat as an essential element of the offense of robbery. In other words, after the enactment of 22 DC Code 2901, Congress intended that a person could be convicted of robbery by using an unloaded gun. As further evidence that Congress intended the offense to be different from common law robbery, Congress abolished the intent to permanently deprive the victim of his property as an element of the offense.

Since the enactment of the statute, there is no known case law restricting the power of Congress to eliminate present ability as an element of the offense of robbery. Nor is there any known case law which restricts the power of Congress to prohibit a forceful taking with the intent to borrow. However, since the enactment of the statute, there have been many cases which hold that the due process clause of the Fifth Amendment restricts the power of Congress to eliminate mens rea as an element of the offense in all but "public welfare offense". Morrisette v. U. S., 342 U.S. 246, 96 L.Ed. 288, 72 S.Ct. 244 (1912). Lambert v. Calif., 355 U.S. 225, 2 Fed 2d 228, 78 S. Ct. 240 (1957). See Judge Murphy's dissent in U.S. v. Dotterweiler, 320 U.S. 277, 88 L.Ed. 48; 64 S. Ct. 134 (1943) in relevant part:

> "There is no evidence in the case of any personal guilt on the part of the respondent...It is a fundamental principle of Anglo-Saxon juris prudence that guilt is personal and that it ought not lightly to be computed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing." See Hall, General Principles of Criminal Law, 2d ed (The Bobbs Merrill Co., Inc., 1960)pp. 325 et seq.

In the instant case, the Grand Jury found that the property taken was in fact the property of the complainant, and there was evidence before the petit jury to this effect. But, neither the U. S. Attorney, nor the courts can legislate the omission of MENS REA back into the Statute.

In the language of Judge Bazelon, Williams v. D.C., US App DC 394 F 2d 957 (No. 20,927, June 28, 1968):

> "This statute (22 DC Code 1107) is plainly unconstitutional on its face, since by failing to require a tendency to breach of the peace it makes punishable the innocuous remarks of the man who stubs his toe or misses his bus. But the majority believes we need only view the statute as applied in this case. It holds that appellant's conviction can be affirmed because he was tried for the "use of 'profane, indecent and obscene words' under circumstances such that a breach of the peace may be occasioned.
>
> The majority opinion presupposes that a defendant can be convicted under an unconstitutional statute so long as he is tried for an offense for which he can constitutionally be punished. This misconstrues the law. True, some Supreme Court cases hold that a defendant cannot challenge the statute under which he was convicted simply because that statute is unconstitutional as applied to other persons or situations. But in those cases the statutes prescribed conduct for which the defendant at bar could be constitutionally punished. The statute in this case does not. Cursing or swearing in a public place, without more, cannot constitutionally be made a crime. Remarks, conversations and arguments are not subject to criminal sanctions unless they threaten a breach of the peace or (perhaps) so affront "contemporary community standards" as to be patently offensive.
>
> In our jurisprudence, crimes are defined by legislators in statutes, not by prosecutors in indictments. That is how we attempt to provide adequate warning to those who must enforce the law. The relevant passages of D.C. Code §22-1107 did not properly define a crime. Appellant cannot be convicted under them." (Judge Bazelon's emphasis omitted, emphasis herein by subscriber).

That the conduct intended to have been proscribed by 22 DC Code 2901 is more than a public welfare offense is believed to be so universally accepted that citation of authority is superfluous. Indeed, the U. S. Attorney must have believed that the conduct intended to be charged was more than a public welfare offense for he drafted the indictment alleging that the property taken was the property of the complainant. Further, the trial judge apparently believed that mens rea was required because he instructed the jurors that "intent to steal" was an essential

element of the offense. It must be remembered that neither the language of the indictment nor the judge's instructions can cure the void statute. Williams v. D.C., Supra.

The question of whether the language of the indictment is sufficient to allege any offense other than a violation of 22 DC Code 2901, which is void, is an interesting diversion. But this question is presently premature. The judgment of conviction leaves no doubt that the trial judge sentenced Defendant pursuant to the void statute. The case must be remanded to him for his consideration as to whether or not the indictment charges any other offense such as any of the assaults mentioned in Chapter IV, Title 22, D.C. Code, or petty larceny in violation of D.C. Code 22-2202. Further, the case must be remanded for his deliberations as to sentence under any other valid criminal statute. U.S. v. Pridgeon,153 US 48, 38 L Ed 631, 14 S. Ct. 746. (1894).

IV. INSTRUCTIONAL ERROR

It will be recalled that the trial judge's "charge" instructed the jurors to the effect that they could return a verdict of guilty (as indicted) if they found that Defendant was an accessory as distinguished from a principal, and that he failed to instruct them that the guilt of an accessory depends upon the guilt of the perpetrator. It will further be recalled that the trial judge's "charge" instructed the jurors that they could convict (as indicted) even though complainant was unaware of the taking. It will also be recalled that the trial judge's charge instructed the jury to the effect that they could convict (as indicted) even though the intent to steal was only the intent to temporarily deprive the complainant of his property. The evidence in support of the "intent to steal" showed that the billfold was abandoned by the taker in a place where it was likely to be recovered by the complainant.

Defendant does not concede that the evidence overwhelmingly showed that he was the perpetrator, nor does he concede that the evidence overwhelmingly showed that the victim was aware of the taking. Assuming, arguendo, that such evidence was overwhelming

even then, the erroneous instructions prejudiced Defendant's right to a jury trial. The jury is the sole judge of the facts in a criminal case. The prosecution must admit that the direction of guilty verdicts is a finding of facts by the trial judge, and that as such it is in violation of an accused rights pursuant to the Sixth Amendment guaranteeing him the right to a jury trial.

In civil cases neither party has a constitutional right to a jury trial on frivolous issues; in criminal cases, the prosecutor does not have a constitutional right to a jury trial on frivolous issues. In civil cases, judgments n.o.v., directed verdicts, and securing judgments in favor of either party have long been the rule. But, it has never been seriously ~~concluded~~ contended that directed verdicts, judgments, n.o.v., or similar judicial action could be entered against a defendant charged with crime. Compton v. U.S.377 F 2d 408 (1967).

To hold that the overwhelming weight of the evidence showed Defendant's guilt of the crime for which he had been indicted, and to hold that therefore there can be no prejudice, is to ignore this fundamental principle of Anglo-Saxon jurisprudence that jurors can be as arbitrary as they wish in returning verdicts of not guilty. They are the sole judges of the facts; they can reject any and all evidence; they can reject a Defendant's confession. (This latter circumstance could happen where a defendant judicially confesses a lesser included offense, but where his denial of the greater offense was being tried by the jury.) To illustrate further, the jury in the instant case, may have arbitrarily rejected all the evidence that showed Defendant's participation as a principal, and yet, according to the instructions, have returned a verdict of guilty as indicted; the jury may have arbitrarily rejected the evidence that the complainant was aware of the taking; and yet, according to the instructions, have returned a verdict of guilty as indicted, as a result of the judge's erroneous instructions.

In a criminal case, your appellant submits that all instructional error is necessarily prejudicial. Prejudice over and above the deprivation of his right to a jury trial need not be shown. To require a showing of prejudice over and above the aforesaid deprivation of jury trial is to assume that the evidence required as a matter of law, a finding of guilty.

V. ACCESSORY INCONSISTENT WITH PRINCIPAL

At common law, accomplices were divided into two categories: (1) Principals; and (2) Accessories. Principals were divided into two categories: (1) Principal in the first degree (perpetrators and instigators); and (2) Principals in the second degree (abettors, at the scene). Accessories were divided into two categories: (1) Accessory before the fact; and (2) Accessory after the fact.

The guilt of a principal in the second degree did not depend upon the guilt of the principal in the first degree. The guilt of an accessory did depend upon the guilt of the perpetrator.

It is clear that an accused may be convicted of a lesser included offense; it is equally clear that the Fifth and Sixth Amendments preclude the conviction on a charge for which the accused has been indicted. Thornhill v. Alabama, 310 U.S. 88, 84 L Ed 1093, 60 S Ct 736 (1940).

In the instant case, Defendant was indicted as a principal. The evidence showed him to be a principal, if involved at all. The judge instructed the jury to the effect that they might convict as indicted if they found that Defendant was an accomplice.

At 22 DC Code 105, Congress enacted a bill in the words and figures following, to wit:

> "§22-105. Persons advising, inciting, or conniving at criminal offense to be charged as principals. In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be."

Appellant submits that it was the intent of Congress that the substantive common law rules were not to be modified; that the guilt of the perpetrator was still to be an essential element of the offense of being an accessory. It was the intent of Congress only that in the case of an accessory, the guilt of the perpetrator need not be found by the Grand Jury, thereby permitting joint trial of the principal and accessory, even over the objection of the accessory. Such a Congressional intent is clearly repugnant to the Fifth Amendment which requires an indictment by the Grand Jury, and to the Sixth Amendment which requires that all essential elements of the offense be alleged in the indictment. Accordingly, 22 D.C. Code 105 is unconstitutional; an instruction that a defendant may be convicted as indicted even though he was not present at the scene, is clearly erroneous. If it be contended that Congress intended to change the substantive law of accomplices, to eliminate the guilt of the principal as an element of the offense of being an accessory, then the unconstitutionality of the statute is even plainer. To punish for "intending to aid and abet" a crime, without regard to whether the criminality of the conduct of the person aided is to permit thought control. Such legislation would permit the conviction and punishment of one who aided and abetted a staged "robbery", "larceny", or "housebreaking", among others, notwithstanding the consent of the victims.

VI. VERDICT IS UNRESPONSIVE TO PLEADINGS AND VOID

Failure to instruct the jury that is their duty to decide the truth or falsity of the facts charged in the indictment is fatal error.

It will be recalled that the trial judge failed to instruct the jurors that it was their duty to determine the truth or falsity of the facts found by the Grand Jury. It will further be recalled, that during his opening statement, the U. S. Attorney announced that he intended to request a verdict of guilty as indicted, and further, that the trial judge referred to his

instructions as the charge on eight separate occasions at points of strategic listener involvement. The petit jury returned a verdict of "guilty as charged". The petit jury failed to state whether they meant guilty as charged by the Grand Jury or as charged by the judge.

It is noted that there was no evidence that the billfold or the change carrier were of any value; it is also noted that the evidence showed that there was only fifty cents in the change carrier. It will be recalled that the Grand Jury found a value of $15.00 in the wallet, and $1.00 in the change carrier; and further found that there was sixty cents in the change carrier. Under this state of the evidence, no conscientious juror could have returned a verdict of guilty as charged by the Grand Jury. A conscientious juror may or may not have returned a verdict of guilty but with exceptions and substitutions in any event. Jurors are presumably honorable men and women. It is concluded, therefore, that the jurors meant guilty as charged by the trial judge and not as charged by the indictment. If so, the verdict was not responsive to the issues and judgment based thereupon is void.

VII. MISCONDUCT OF TRIAL DEFENSE COUNSEL

It will be recalled that the U.S. Attorney on rebuttal, asked the witness on direct, to state to the jury certain facts which appeared on a document. The document had never been properly authenticated as a business record exception to the hearsay rule. Even if it had been so authenticated, the record would have spoken for itself. The witness should not have been permitted to testify as to what was on the record. The document could have been used to refresh the witness' independent recollection, if he ever had knowledge of the facts recorded thereon. But, the witness' independent recollection was never established by the prosecution. Trial defense attorney failed and neglected to object to the testimony by the witness as hearsay. He further failed and neglected to object to the testimony on the ground of relevancy. It is elementary that the testimony by the witness

on behalf of the opposing party can be impeached on matters which are relevant to the issues. It is error to permit, over objection, the contradiction of a witness on collateral matters. 58 Am Jur 432 et seq., §782, et seq., Witnesses. However, defense attorney failed and neglected to object.

It will also be recalled that trial defense attorney and the U. S. Attorney entered into a stipulation at the bench in Defendant's absence. The oral stipulation was read to the jury. The trial judge failed to inquire as to whether Defendant consented to the stipulation. The stipulation was used with devastating effect by the U. S. Attorney in his closing argument.

It will also be recalled that trial defense attorney failed and neglected to make one objection during the progress of the trial. It will be recalled that on final argument, he urged the jurors to give Defendant his just desserts. Defense attorney even obliged Defendant to state the name of the movie he was watching at the time of the alleged incident. This question by defense attorney was devastating. That it was asked by trial defense attorney is shocking.

It will also be recalled that trial defense attorney failed and neglected to inquire of the bailiff as to the source of the array from which he obtained the jurors. Records of the District Court show many cases where the customary procedures for selecting the array was challenged. U.S. v. Haywood, Crim. No. 690-68; U. S. v. Boddie, Crim. No. 446-65; U.S. v. Hayes, Crim. No. 240-68; U.S. v. Duckett et al, Crim. No. 827-68. The Washington Post for November 15, 1968, carried a story about the inequities of the D. C. jury selection system. The American Civil Liberties Union has been very active in this field, and is known to have been cooperative with counsel in supplying the information and assistance necessary to raise the challenge. Notwithstanding this publicity, trial defense attorney failed and neglected to challenge the array.

In fairness to trial defense attorney, who is believed to be highly capable, it is suggested that his errors resulted from

the loss of confidence by him in his client, and in his client's veracity. It appears that there may have been a serious personality clash between attorney and client, and that the client may or may not have been responsible for the clash.

The trial judge should have avoided the clash and removed trial defense attorney from the case; in the alternative trial defense attorney should have requested to be relieved from the case. Regretfully, the procedures for accomplishing the withdrawal of a court-appointed counsel are not adequately developed. It is believed that attorneys' requests for leave to withdraw are routinely denied by the trial court in this jurisdiction.

All of the errors of commission and omission by trial defense attorney establish that Defendant was denied the effective assistance of counsel and that the trial judge, sua sponte, should have declared a mistrial for this reason: Killilea, supra. Gori, supra.

CONCLUSION

Your Appellant submits that the imposition of sentence under a void statute is jurisdictional error, in which case a vacation of the judgment of commitment is required regardless of prejudice to the substantial rights of the accused.

Your Appellant further submits that the erroneous instructions in and of the rules denied Appellant of his right to have the jury decide what evidence it would accept and what evidence it would reject. The right to trial by jury is a substantial right. Prejudice to that right requires a reversal.

Your Appellant further submits that he has a right to a trial by fair and impartial jurors and the right to the effective assistance of counsel, both of which are substantial rights. Your Appellant further submits that the trial judge is bound to protect those rights and that his failure to declare a mistrial because of the improper evidence before the petit jury, and

because of the conduct of a trial defense counsel in failing to assist Defendant was prejudicial error.

Your Appellant further submits that any one of the errors complained of is so substantial as to require reversal; and that in any event the accumulation of the errors shows his trial to have been a travesty, and that reversal is required, with an order for new trial.

Respectfully Submitted,

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Counsel for Appellant
Appointed by United States
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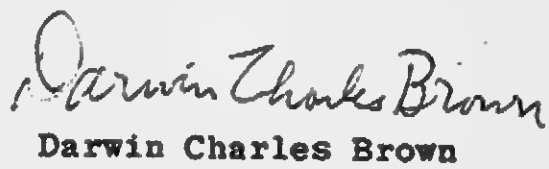
District of Columbia Circuit.

January 17, 1969.

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Brief in the case of Porter v. U. S.; #22,225 were personally delivered to the offices of Honorable David G. Bress, Esq., United States Attorney for the District of Columbia, on January 16, 1969.



Darwin Charles Brown

STATES OF AMERICA, APPELLEE

e United States District Court

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied on are marked with asterisks.

III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Did the court err in not declaring a mistrial, *sua sponte*, when a rebuttal witness contradicted appellant's story that he was in a theater watching a certain movie at the time of the robbery?

2. Did the court err in instructing the jury that appellant could be convicted as an aider and abettor where the evidence showed that appellant and a companion together went up to a man, stopped him and forcibly took property from him, and that appellant may or may not have personally taken the property from the victim's possession?

3. Was appellant denied effective assistance of counsel where the low-keyed strategy of his experienced criminal lawyer, apparently adopted in view of the defense's very weak case, failed to save appellant from conviction?

4. Is the robbery statute, 22 D.C. Code § 2901, valid?

5. Was appellant's conviction void because of a minor variance between the indictment and the proof as to the value of the property taken from the victim?

6. Was appellant's sentence under 18 U.S.C. § 5010(c) valid where there is support in the proceedings below for the court's conclusion that appellant may not be able to derive maximum benefit from a six year, 18 U.S.C. § 5010 (b) commitment?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,225

DANIEL PORTER, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed January 24, 1968 appellant was charged with robbery, 22 D.C. Code § 2901. At trial on May 6, 1968, before United States District Court Judge Gerhard A. Gesell, sitting with a jury, appellant was convicted as charged. On July 5, 1968 Judge Gesell sentenced appellant pursuant to the Federal Youth Corrections Act, 18 U.S.C. § 5010(c), for a period of eight years. This appeal followed.

At trial the following was brought out: On Sunday, November 12, 1967, at about 3:45 p.m., complainant

Thomas H. Wharton, age 68, was walking through an alley in the Seat Pleasant area of Northeast, Washington when two young men walked up to him and grabbed his hands, saying "This is a stick-up." Complainant, needless to say, was frightened. The men backed their victim against a building and started searching him. They took a change carrier containing some 50 cents, and a wallet containing some $8 and several credit cards. Then they ran away. Complainant later found his wallet, torn and ripped apart, lying in a nearby street. Some credit cards and the $8 were missing. (Tr. 20-26, 45.)

The robbery was witnessed by Fermon Leslie Williams, age 12. Fermon was playing football with some friends near the alley in question when he saw two boys go up to complainant, say something to him, go through his pockets, remove a wallet and change purse, and run away (Tr. 30-33). Fermon recognized the boys, having seen them many times before (Tr. 34). He identified appellant, in-court, as one of the boys who committed the robbery (Tr. 35, 36).[1]

Appellant testified in his own defense, denying participation in this robbery and stating that on November 12th, from about 1:30 p.m. until 11:00 p.m., he was in the Broadway Theater on Seventh Street, Northwest watching the movie "Valley of the Dolls" (Tr. 51). He also testified that he knew Fermon Williams and considered him a friend (Tr. 50, 51).

In rebuttal, the Government presented Aaron Hunter, a supervisor of the chain of theaters of which the Broadway was a part. He testified from business records that on Sunday, November 12, 1968 the Broadway Theater was showing the features "Wild Rebel" and "Blues for Lovers." (Tr. 81-83.)

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[1] Appellant's companion and co-defendant, also known to witness Williams and identified by nickname, pled guilty to the charge of robbery on May 3, 1968 (Tr. 34, 35, 53, 54).

ARGUMENT

I. The trial court acted within the ambit of its discretion in receiving in evidence testimony which directly contradicted appellant's alibi defense. Therefore appellant's contention, that the court's failure to declare a mistrial *sua sponte* compels reversal, is without merit.

Appellant relied below on an alibi defense. He testified that at the time of the offense he was in the Broadway Theater on Seventh Street, N.W., where the movie "Valley of the Dolls" was showing. In rebuttal, the Government called a supervisor of the chain of theaters including the Broadway who testified, from official business records, to the effect that "Valley of the Dolls" was not showing at the Broadway Theater on the day in question. Appellant argues that this contradiction of his testimony was irrelevant, and that its admission constitutes reversible error. We disagree.

Ordinarily, decisions on the relevancy of evidence are properly left to the sound discretion of the trial judge, and will not be disturbed on appeal except upon a showing of grave abuse. *Hardy* v. *United States*, 118 U.S. App. D.C. 253, 335 F.2d 288 (1964).

Such a showing of abuse has not been made here. Appellant suggests (Br. 10) that his testimony naming the movie he claimed to be viewing during the time the robbery occurred was collateral matter, and that further exploration was precluded since the names of movies being shown in a given theater on a given day were independently inadmissible. However, as this Court said in *Ewing* v. *United States*:[2]

> . . . The fallacy in appellant's contention is that he would determine whether matter is "collateral," and

[2] *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943), The Court upheld a conviction for rape. A witness who had testified favorably to defendant was asked if she had told the victim's mother that Ewing was facing the electric chair and that she would have to be on his side. The

> therefore the [examining] party is bound by the witness' answer, solely by reference to whether it would be or would have been admissible as part of the party's case in chief. In other words, he would ignore the fact that the witness has testified. That makes all the difference in the world. It makes admissible facts . . . for impeachment purposes. The mere fact that matter is offered for impeachment does not make it "collateral" . . . . *But when it goes to challenge directly the truth of what the witness has said in matters crucial or material to the issue on trial, by no process of reason can it be held "collateral."* If it is of that character, it is admissible either by way of cross-examination or by way of contradiction . . . (at 77 U.S. App. D.C. 22, emphasis supplied)

It is difficult to imagine evidence more material than that relating to appellant's whereabouts at the time of the crime. Testimony rebutting a specific fact of appellant's alibi was therefore relevant and properly admissible. *United States* v. *Klein*, 187 F.2d 873 (7th Cir. 1951), *cert. denied*, 341 U.S. 952 (1951), *Cf.*, *Atkinson* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 197 F.2d 244 (10th Cir. 1952); *Walder* v. *United States*, 347 U.S. 62 (1954); *United States* v. *Colletti*, 245 F.2d 781 (2nd Cir. 1957). On the uncomplicated facts of this case, there was virtually no danger that the ill effects associated with unreasonable exploration of collateral affairs, those being (1) confusion of the issues; (2) undue extension of the trial; and (3) unfair surprise regarding matters unanticipated,[3] would result.

Appellant complains of prejudice, stating at Br. 10: "The jurors may have thought defendant's testimony to have been a fabrication, but, considering this testimony

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witness answered negatively. The prosecution then called the girl's mother, asked the same question, and received a contradictory reply. The court found the mother's concise, statement-of-fact testimony to be material and properly admissible notwithstanding that it could not have come in independently of the defense witness' testimony.

[3] *Id.*

by the supervisor, they were now told beyond all doubt that defendant's tale was a fabrication." It has long been established that the power to declare a mistrial *sua sponte* and alleviate manifest injustice is to be exercised cautiously, within the sound discretion of the trial court. *United States* v. *Perez*, 22 U.S. 579 (1824); *Wade* v. *Hunter*, 336 U.S. 684 (1949). We submit that, in the case at bar, the trial court stayed well within the ambit of its discretion in declining to shield appellant from a brief recitation of embarrassing facts which his own imaginative testimony had brought on.

II. Appellant's contention that the trial court improperly permitted him to be convicted as an aider and abettor is without merit.

(Tr. 103)

Judge Gesell instructed the jury that they could find appellant guilty as charged without finding that he, personally, committed each of the acts constituting the offense. If appellant merely aided and abetted in the robbery charged, he was to be treated as a principal to that crime. (Tr. 103.) Appellant contends (Br. 17) that this was improper since the evidence showed him to be a principal, if involved at all. We disagree.

While sufficient evidence existed for the jury to find that appellant himself performed each of the acts constituting the robbing of complainant (for example, the actual snatching of the wallet), it was also possible to infer from the evidence that appellant's companion performed some of the acts with appellant's aid. Therefore, the court properly permitted appellant to be found guilty as an aider and abettor though he had been charged as a principal. *Jones* v. *United States*, —— U.S. App. D.C. ——, 404 F.2d 212 (1968).[4]

[4] This, we feel, also disposes of the point in part IV of appellant's brief (Br. 15) concerning the trial court's instruction with regards to principal and "accessory". Appellant's other two points in this section are frivolous. First, that the evidence showed that the victim was aware of the taking cannot be seriously disputed. Even

Appellant contends (Br. 18) that 22 D.C. Code § 105 invalidly permits one to be convicted as an abettor where there is no showing of the guilt of the principal actor. However, this question has been settled by this Court, adversely to appellant's claim. *Cross* v. *United States*, 122 U.S. App. D.C. 380, 354 F.2d 512 (1965); *Gray* v. *United States*, 104 U.S. App. D.C. 153, 260 F.2d 483 (1958). Furthermore, appellant's companion, who must have been the principal if the jury in fact regarded appellant as a mere abettor, pled guilty to robbing complainant. In sum, we fail to see how appellant was in any way prejudiced or unfairly treated.

III. Appellant was not denied the effective assistance of counsel below.

(Tr. 73, 92)

Appellant contends (Br. 19-21) that errors of commission and omission by his trial counsel below, an experienced criminal lawyer, denied him of the right to effective assistance. We disagree.

The burden of demonstrating ineffective assistance of counsel is a heavy one. Appellant must prove that counsel's performance was so inadequate as to preclude a fair trial. *Harried* v. *United States*, 128 U.S. App. D.C. 330, 389 F.2d 281 (1967); *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958); *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958). Appellant has not made such a showing.

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if it could be disputed, awareness on the part of the victim is not necessary for a robbery conviction. *Davis* v. *United States*, Nos. 21,949, 22,208, decided February 18, 1969. Second, appellant's interpretation that the court permitted the jury to convict even though appellant only intended to temporarily deprive complainant of his property is without support in the record. Assuming *arguendo* that the discarding of complainant's ruined wallet within a few blocks of the taking evinces an intent to return it, the evidence is clear that the money within the wallet was not similarly discarded and was never returned.

Appellant's criticism of counsel below focuses primarily on differences of opinion as to what would have been the most efficacious strategy and tactics to employ. But as this Court stated in *Edwards* v. *United States*, *supra* at 103 U.S. App. D.C. 153:

> Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a "mockery of justice."

The case at bar reveals no such mockery, only an unsuccessful attempt of a low-keyed strategy seeking a favorable result where the defense had preciously little with which to work.

Appellant complains that counsel urged the jurors to give defendant his just desserts. By this, counsel was not inviting conviction, but was asking for justice for his client in what seemed a hopeless case. His summation recited, in part (Tr. 92):

> . . . All I ask you to do is this: Don't go back to the jury room and immediately seize upon a conclusion that this defendant must be guilty without weighing all of the evidence . . . .
>
> I leave it to your own good judgment in this matter. Give this young man his just desserts, that is all I ask you to do. In the language of one of my closest friends who is now a member of this Court, simple justice. That is all.

That counsel could have been more aggressive is not grounds for reversal. *Bruce* v. *United States*, *supra*. It is mere speculation that a different approach could, on the facts of this case, have produced a more favorable result.

Counsel is also criticized for not objecting to testimony from the theater's official business records (which the prosecutor could have introduced *in toto* per 28 U.S.C. § 1732), for entering into a stipulation as to when appellant learned of the charge against him (Tr. 73) (which the court suggested would preclude appellant's answers

prejudicing himself), and for asking appellant to state the name of the movie he had gone to (which was essential if appellant's alibi was to be given any belief). Appellant also notes that counsel failed to challenge the array of jurors, or to make objections during the progress of the trial. Appellant has failed to proffer any evidence whatsoever to justify the belief that the behavior outlined now would or could have materially aided his cause below.

We submit that appellant has fallen far short of the showing required to support a claim of ineffective assistance of counsel.

IV. The robbery statute under which appellant was convicted is valid.

Appellant's claim that 22 D.C. Code § 2901 is unconstitutional because its words do not literally require *mens rea* as a requisite for guilt is without merit. Section 2901 has been declared constitutionally valid by this Court. *Pope* v. *Huff*, 79 U.S. App. D.C. 18, 141 F.2d 727 (1944); *Neufield* v. *United States*, 73 U.S. App. D.C. 174, 118 F.2d 375 (1941), *cert. denied*, 315 U.S. 798 (1941). This Court has interpreted Congressional intent as meaning to include all the elements of common law robbery (*mens rea* being one) in the statutory offense. *Byrd* v. *United States*, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965); *Neufield* v. *United States, supra*. Therefore, *mens rea*, in the form of the specific intent of the defendant to deprive the victim of his property, has been interpreted into the robbery statute, its absence in any given case precluding conviction. *Jackson* v. *United States*, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965).[5]

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[5] *Williams* v. *District of Columbia*, D.C. Cir. No. 20,927, decided June 28, 1968, cited by appellant to support the proposition that § 2901 is invalid on its face (Br. 14), holds that the defendant was properly convicted of the use of profane words tending to provoke a breach of the peace. The statute involved, 22 D.C. Code § 1107, did not expressly state that a tendency to breach the peace was a requisite for conviction.

V. Appellant's contention that a fatal variance between the indictment and the proof exists, rendering his verdict void, is without merit.

Appellant contends (Br. 18) that the indictment and the proof differ regarding the value of the money and containers taken from complainant, and that this defect voids the verdict against him. We disagree. The proof revealed that property of some value was taken from complainant. That there may be some doubt about the precise value (within a range of a few dollars) neither affects the character of the offense, nor prejudices appellant in any way. Absent at least a showing of a reasonable possibility of prejudice, which appellant has not made, a variance of the type presented here is not fatal. *Jackson* v. *United States*, 123 U.S. App. D.C. 276, 359 F.2d 260 (1966); *Epps* v. *United States*, 81 U.S. App. D.C. 244, 157 F.2d 11 (1946); *Berger* v. *United States*, 295 U.S. 78 (1935). Appellant's claim that the verdict against him is void is therefore without merit.

VI. Appellant's sentence is valid.

On July 5, 1968 Judge Gesell sentenced appellant pursuant to 18 U.S.C. § 5010(c), Federal Youth Corrections Act, for a maximum period of eight years. Appellant contends that his sentence is void because the record on appeal does not contain an express finding that appellant, in the words of § 5010(c) "may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years . . ." This contention is without merit. We think it inappropriate for appellant to raise the issue before this forum since he has declined to make a transcript of the sentencing procedure part of this record. F. R. A. P. 10(b).

However, while appellee is not aware whether such a transcript would recite the express finding that appellant claims is lacking, we believe that such a finding is unequivocally implied by the eight year term prescribed by the experienced trial judge. It cannot seriously be con-

tended that he did not understand his sentencing options, and there is considerable evidence in the proceedings below that a § 5010(c) commitment was a valid exercise of his sentencing discretion.

Relying in part on a probation report which was available to him prior to sentencing, Judge Gesell filed a November 11, 1968 order denying appellant's motion for bail pending appeal in which he stated that, in addition to the robbery of which he had just been convicted, appellant had been extensively involved in housebreaking, illegal entry, larceny, disorderly conduct and drunkenness over the past several years. This information undoubtedly contributed to Judge Gesell's sentencing decision. *Carter* v. *United States*, 108 U.S. App. D.C. 405, 283 F.2d 200 (1960). Standing alone (and the court had before it additional information adverse to appellant), this justified the court's conclusion that appellant "may not be able to derive maximum benefit" from a § 5010(b) commitment.

Appellant claims that some of the information the court relied on may be unreliable since it was not tested by cross examination or rebuttal. However, it is well settled, due to the weight of competing considerations, that appellant is denied no substantial right when he is unable to confront and rebut the information supplied by the probation office to the trial court, post-conviction. *Williams* v. *New York*, 337 U.S. 241 (1949); *cf.*, *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Ishkanian* v. *United States*, 35 A.2d 176 (Mun. Ct. App. D.C. 1943); *United States* v. *Fischer*, 381 F.2d 509 (2nd Cir. 1967); *Baker* v. *United States*, 388 F.2d 931 (4th Cir. 1968); *Thompson* v. *United States*, 381 F.2d 664 (10th Cir. 1967); *United States* v. *Weiner*, 376 F.2d 43 (3rd Cir. 1967).

CONCLUSION

WHEREFORE, appellee respectfully requests that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
HARVEY S. PRICE,
Assistant United States Attorneys.

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SEQ. #13

TITLE GUIDE

United States Circuit Court Of Appeals

D.C. CIRCUIT

CASE NAME S. K. COBLE VS. USA

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BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

613

No. 22,227

SWINDELL K. COBLE,
APPELLANT

v.

UNITED STATES OF AMERICA,
APPELLEE

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Jerry H. Brenner
1250 Connecticut Avenue
Washington, D. C. 20036

Attorney for Appellant
(Appointed by this Court)

No. 22,227

Questions Presented

1. Whether appellant's conviction should be reversed because the trial court allowed into evidence an extrajudicial statement of an alleged accomplice.

2. Whether reversal is required because the trial judge improperly endorsed the credibility of and gave weight to the testimony of a key Government witness.

3. Whether appellant is entitled to reversal of his conviction because the trial court allowed the Government to reopen its case after the defense had presented its case.

This case was not previously before this Court under the same or similar title.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,227

SWINDELL K. COBLE,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a conviction in the District Court of appellant Coble on one count of house breaking and one count of petit larceny. This court has jurisdiction under 28 USC §1291.

STATEMENT OF THE CASE

The indictment alleged that appellant Coble, and two accomplices, Ezekiel Cunningham and Rudolph Russ, violated Title 22, §1801 and §2202, of the District of Columbia Code in that on July 27, 1967: (1) they entered the building of one Emil Lachman with the intent to steal property; and (2) they stole money in the amount of $3.50 from Emil Lachman and Sol Cooper Coble was tried individually before a jury and was found guilty on both counts. He received a sentence of 4 to 12 years.

The testimony showed that, shortly after midnight, on July 27, 1967, Coble, with two other individuals, was found in a carnival supply store owned by Emil Lachman and Sol Cooper. Appellant was found therein by four police officers who had responded to a call. Walter Branch, an individual who had lived near the store had earlier telephoned the police to notify them of a breaking into the store.

Walter Branch, a Government witness, testified that he lived across the street from the carnival supply store owned by Lachman and Cooper. Shortly before the arrest, on the night in question, Branch looked out his window because he heard his dog barking. Outside he saw three men, one on his side of the street and two on the other side. Tr. 74. Branch testified that he then went out on the front porch and was seen by the individual on his side of the street. That individual crossed the street and joined the other two men. Branch further testified that he came back in his house

and walked up to his bedroom. He looked out his bedroom window and saw three individuals near the carnival supply store. Tr. 75. Branch said that he then heard glass break and saw three men enter the store. Tr. 75. He saw no other individuals on the street at that time. Tr. 75. He called the police who, in his estimation, arrived about three minutes later. Branch did not identify any of the people he testified he saw.

During the course of Branch's testimony, he apparently spoke in a soft tone. The Court instructed Branch to speak up, characterizing his testimony as "important." Tr. 73-74.

Officer Yanulevich, one of the arresting officers, testified that at approximately 12:10 a.m., he received a call to go to 6321 Blair Road, N. W. (the carnival supply store). It took him about 10 minutes from the time he received the call to the time he saw appellant on the premises. Tr. 27. He said that when he arrived he saw broken glass on the sidewalk in front of the store. He, together with Detective Hosie, went through a window that was broken and began a systematic search of the premises. Tr. 18. He testified that they found Coble and one of the alleged accomplices, Cunningham, at the rear of the store. Tr. 19,20. They took the prisoners to the front of the store and then located the third alleged accomplice, Russ.

Yanulevich testified that he searched the defendant. He took $2.60 in change from Coble and $3.90 in change from Russ. Tr. 21-23,

Gov. Exhs. 4 and 5. The third individual, Cunningham, had no money in his possession. Tr. 28, 29. Yanulevich also testified that Coble gave him 50 cents to get Coble two packs of cigarettes. Tr. 29.

Detective Hosie, anotner arresting officer, testified that Yanulevich was already at the premises when he arrived. The two entered together and found Coble and Cunningnam at the rear of the building. Hosie said that there were three apparent attempts to break into the building. Tr. 31,32. The first attempt was unsuccessful because of a barricade. Tr. 33. Hosie said that he and Yanulevich entered the building through a window which was the apparent point of entry.

Officer Greenier, also an arresting officer, testified that he arrived on the scene at approximately 12:08 a.m. About five to ten minutes after his arrival, he and another officer, Donahue, entered the premises through a window. Greenier said that he and Donahue searched the building and found a man, Russ, in the storage area, near the front of the store, behind some boxes. Tr. 83. Greenier testified that this area was near the ceiling and required the climbing of a ladder to get to it. Greenier said he heard Russ move but did not see him. Greenier further testified that Russ then hollered to Donahue, as Donahue was going up the ladder, "I give up, don't shoot me." Tr. 84.

Officer Donahue, the fourth arresting officer, testified that when he arrived Yanulevich and Hosie were already in the store and had two prisoners, Coble and Cunningham, in their custody. Tr. 86,87. He said that he and Greenier then climbed through the window and made a search. Donahue said that he found Russ hiding in a storage area in the building. He further testified that he started up a ladder toward the place where Russ was found and heard someone say: "Don't shoot, I am coming out." Tr. 87.

Emil Lachman, a Government witness and co-owner of the store in question, testified that he came to the store after appellant was arrested. He said that all the silver was missing from the

petty cash drawer which was in the store. Tr. 49. He testified that there was about $15.00 in change in the drawer. He arrived at this figure by balancing out the money and finding that the cash was $15.00 short. Tr. 50. Lachman said that the money in question belonged to the partnership of Lachman and Cooper and that he neither gave Coble permission to go into the store nor to take the money from the cash drawer. Tr. 52,53. Lachman also stated that one of the alleged accomplices, Russ, was an employee of the store. Tr. 50.

Appellant denied breaking into the store or stealing any money. */ Tr. 99. He testified that on the day in question he was working at a grocery store in Georgetown. There he met Russ and Cunningham with whom he had some drinks. Tr. 97. The three went out to a restaurant in Maryland and continued drinking. Tr. 98. The three were drinking all through the day and at Russ's suggestion decided to walk from Maryland to the carnival supply store where Russ was employed. Tr. 98. Coble said that Russ had a key to the door. When they arrived at the store the door

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*/ Support for the validity of appellant's assertions can be found from two factors: (1) The three individuals had only $10.00 in their possession at the time of the arrest, $5.00 less than the amount allegedly stolen; and (2) Russ, who was an employee of the store, probably would have known of any barricade and would not have attempted an entry from that point.

was closed but not fastened shut. Tr. 98. Russ then pushed the door open. Tr. 98. Appellant testified that Russ told him that he wanted to check the place out and that he had some money in the store. Tr. 98-99. Appellant then entered the store with Russ and almost immediately thereafter the police came in. Tr. 99. Appellant and Cunningham went to the back of the store where they were found by the police. Tr. 109.

Appellant admitted that he had change on him at the time that he was arrested. He testified that he acquired the money from working, shooting craps, and selling wine. Tr. 98, 106, 107. He denied that he took money from the cash drawer.

On rebuttal officer Yanulevich testified that Coble was not intoxicated. Tr. 117. And Mr. Lachman testified that he did not give a key to Russ. Tr. 117.

After the defense rested, the Government, because of a lapse on its part, requested the court to allow it to reopen its case to present evidence concerning a description of the petty cash drawer. Tr. 120. The court had previously denied a similar request of the prosecution prior to the presentation of the case of the defense, because of the lack of relevancy of such testimony. Tr. 91. However, at this point the prosecution was allowed to recall Lachman to describe the petty cash drawer. The petty cash drawer was described as a small rotating drawer, in a metal desk,

which had compartments for pennies, nickels, dimes and quarters. Tr. 121.

SUMMARY OF ARGUMENT

Appellant was convicted in the District Court of housebreaking and petit larceny. During the course of his trial three reversible errors were committed.

Appellant was plainly prejudiced by testimony of an extrajudicial incriminating statement of one of the persons found in the store with appellant. The statement testified to constituted an admission by that person that he was guilty, and, therefore, plainly told the jury, as recent cases make clear, that appellant was also guilty. The error was made worse, if possible, by the fact that the person who allegedly made the incriminating statement was not on trial. The error was plainly so prejudicial that reversal is required.

Secondly, the court erred when it commented on the evidence of the Government's witness Branch. The court called the testimony of the witness "important." The fact that it did so, taken both by itself and in light of the circumstances surrounding the comment, undoubtedly greatly influenced the jury's deliberation and prevented it from giving proper consideration to the witness' and appellant's testimony. This error also requires reversal.

Finally, the court permitted the Government to reopen its case after the defense rested. The only justification was the government's self-admitted "lapse" in failing to put the additional evidence in its case-in-chief, as it easily could have done. Permitting the Government to reopen its case after the defense had rested denied appellant of his important right, limited only by the government's right of rebuttal, to put his case before the jury after the government presents its case. This error also deprived appellant of a fair trial and requires reversal.

Objection was raised to the third of these errors. It was not raised to the first two. But these errors were so prejudicial as to constitute plain error affecting substantial rights and thus to require reversal.

I

Appellant's Conviction Should Be Reversed
Because Court Allowed into Evidence
Extrajudicial Statement of Alleged Accomplice

At the trial, Officer Greenier was allowed to testify that, while he was searching for Russ, he heard Russ holler: "I give up, don't shoot me." Tr. 24. That statement was an inadmissible extrajudicial incriminating declaration which seriously prejudiced appellant. No motion to strike the testimony was made by appellant's trial counsel. Nevertheless, the admission of the statement was plain error under Rule 52(b) and requires reversal.

By bringing in testimony of the acts and incriminating declarations of an alleged accomplice, the prosecution sought to demonstrate guilt by association. An accomplice of appellant admitted that he committed a crime, ergo the appellant committed a crime. One does not "give up" to the police unless he has committed a crime. The jury undoubtedly construed the statement in that light, and assumed that appellant was guilty because one of his companions was guilty. Such a means of proving guilt is extremely effective as well as extremely unfair, as a jury will rely heavily on a confession of a co-defendant or accomplice. In fact, the jury will be so influenced by such confessions, that a trial cannot be considered fair where such confessions are admitted into evidence. Bruton v. United States, 391 U.S. 123 (1968). Sims v. United States, ___U.S. App. D.C., ___, ___ F. 2d ___ (No. 21,300 Nov. 15, 1968).

The problem concerning confessions of accomplices has arisen mainly in connection with joint trials. In those cases confessions were introduced to prove the guilt of the declarant. Although such confessions were inadmissible hearsay against other than the declarant, the Supreme Court, at one time, held that such confessions were admissible so long as the jury was clearly instructed that the confessions would have no weight against anyone other than the declarant. Delli Paoli v. United States, 352 U.S. 232

(1957). Recognizing the impact that such a confession can have on a jury, even though a limiting instruction was given, all courts did not accept the Supreme Court's decision in Delli Paoli. E.g., State v. Blanchard, 44 N.J. 195, 207 A. 2d 661 (1965).

Finally, in Bruton v. United States, the Supreme Court pronounced such confessions as completely inadmissible. The Court pointed out that testimony referring to an extrajudicial confession of an accomplice could not conceivably be disregarded by a jury despite a limiting instruction. Bruton not being able to cross-examine the alleged confessor, was therefore denied the right of confrontation as guaranteed by the sixth amendment. */ The Court applied a rule which it pronounced in a case in which a joint trial was not involved, Pointer v. Texas, 380 U.S. 400 (1965). In that case, the Supreme Court reversed a conviction because the trial court had admitted into evidence a confession of an accomplice inculpating the defendant. The statement in question was made at a preliminary hearing at which the defendant had no counsel. Defendant was then tried individually and the accomplice's confession used against him. The Supreme Court held that this

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*/ Cross-examination was indeed essential to explain what the statement meant or if indeed the statement was in fact made. Officer Donahue phrased Russ's statement differently. He testified that Russ stated, "don't shoot, I am coming out," clearly far less inculpating than the statement as testified to by Greenier.

conduct violated defendant's right of confrontation as guaranteed by the Sixth Amendment.

The case at hand is clearly governed by Bruton and Pointer. In fact, the error is even more indefensible than the error in Bruton. In this case, the statement of Russ had no relevance whatsoever as Russ was not on trial. Moreover, there was never any instruction limiting the weight to be given to the testimony. Thus, the statement of Russ could have no other effect than to implicate appellant without giving appellant an opportunity to cross-examine Russ, and thereby to deprive appellant of a fair trial.

In Bruton, it was also recognized that the confession of the declarant, as against the nondeclarant, was an inadmissible hearsay statement. In the present case Russ's statement is clearly an unsworn extrajudicial statement and, therefore, clearly inadmissible because of the hearsay rule. E.g., Jones v. United States, 126 U.S. App. D.C. 36, 365 F. 2d 295 (1967); Cannady v. United States, 122 U.S. App. D.C. 99, 351 F. 2d 796 (1965).

Appellant recognizes that where accomplices are involved a conspirator exception to the hearsay rule exists. However, such exception applies only to acts and declarations of conspirators in furtherance of the conspiracy. Krulewitch v. United States, 336 U.S. 440 (1949). Once the conspiracy terminates, any declarations are merely extrajudicial statements admissible only against

the declarant. Grounds for reversal are present where such statements are used to inculpate a non-declarant. Wong Sun v. United States, 371 U.S. 471 (1963); Krulewitch v. United States, supra; Fiskwick v. United States, 329 U.S. 211 (1946); Kramer v. United States, 115 U.S. App. D.C. 50, 317 F. 2d 114 (1963); Taylor v. United States, 104 U.S. App. D.C. 219, 260 F. 2d 737 (1958); Kelley v. United States, 99 U.S. App. D.C. 13, 236 F. 2d 746 (1956).

Krulewitch and Fiswick make clear that the conspiracy comes to an end when the overt acts in furtherance of the conspiracy have been completed. Attempts to conceal the conspiracy are not considered to be acts in furtherance of the conspiracy. Moreover, the often-made argument that in every conspiracy there is an implicit conspiracy to conceal the commission of the crime has been rejected so as to prevent further breach of the hearsay rule. Krulewitch v. United States, supra; Lutwak v. United States, 344 U.S. 604 (1953).

In this particular case, assuming arguendo there was a conspiracy,*/ and also assuming arguendo that money was taken, the conspiracy came to an end as soon as the money was taken. Indeed, there can be no question that the conspiracy was at an end after

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*/ No conspiracy was alleged or charged.

the arrest of appellant, which was prior to the time Russ allegedly made the statement. Therefore, the statement itself, was purely hearsay and could not fall within any of the exceptions to the rule.

Russ's statement was very prejudicial to appellant's interests. It inculpated Russ and since appellant was acting with Russ, the statement would automatically inculpate him. The jury could not possibly have put out of its mind the implication of guilt when it heard that an accomplice admitted guilt. We submit then that it was erroneous to allow Russ's statement to be considered by the jury. The prejudice to appellant from the admission of the testimony was so grave and so patent that it clearly constitutes plain error affecting substantial rights correctible on appeal under Rule 52(b).

II

The Court Improperly Endorsed the Credibility of and gave Weight to the Testimony of a Key Government Witness

The jury is the trier of facts and the sole judge of the credibility of the witness. In this particular case, howevever, the trial judge invaded that province of the jury by characterizing the witness Branch's testimony as "important." In one stroke he endorsed the credibility of the witness and also told the jury, in effect, that Branch's testimony must be given

special weight and therefore, that greater deference had to be given to it than to that of other witnesses, including the appellant. That error by the court seriously prejudiced appellant and demands reversal.

The influence of the court's characterization of Branch's testimony as "important" was enhanced by the events which preceded the comment. After Branch took the stand and the prosecution asked a few questions concerning the location of Branch's house in relation to the carnival supply store, the prosecution asked:

"Can you tell us what happened sometime after 11:30?" Tr. 62.

Branch was not given an opportunity to respond to that as the Court interjected the following to the prosecution:

"Before he begins testifying you had better come up here." Tr. 62.

The court then told the prosecution to instruct the witness not to discuss anything about his seeing three individuals tampering with automobiles. The prosecution did not want to do this in the presence of the jury; therefore, the jury was dismissed. However, Branch remained in the court room when the jury went out and was there when the jury returned -- a period of about fifteen minutes. Since the trial judge in the presence of the jury obviously talked to the prosecution about Branch's testimony and since the witness as far as the jury could tell, remained in the court room, the members of the jury could not

help but think that the purpose of their being sent out was so that the judge could discuss the witness's testimony with him. Then for the court to characterize the witness's testimony as "important" almost immediately after the jury returned, could do nothing less then to lead the jury to believe that the Court knew what the witness was going to testify to, that the testimony was credible, and that the testimony was to be given great weight.

It is well known that juries hold the trial judge in the greatest esteem and are tremendously influenced by his every comment. If a trial judge indicates that certain testimony should be given great weight, the jury will certainly give the testimony great weight. If the judge indicates that a witness is more credible than others, the jury will certainly give the witness in question more credibility than others.

To summarize: the court's calling Branch's testimony important could not help but sway the jury in regard to the weight to be given to that testimony. This seriously prejudiced appellant because his defense was predicated on the contention that others must have been in the store before him and his friends. Branch's testimony was inconsistent with that, as he maintained he saw or heard no one around the store that evening until shortly before he summoned the police. Given the court's comment, however, the jury could not fail to give full credence to Branch's statements.

The failure of appellant's trial counsel to object to the court's comment does not overcome the error, which was plain error affecting appellant's fundamental right to have the jury, and the jury alone, determine the weight and credibility to be given to all the testimony, and which thus requires reversal of the conviction.

III

Reversal Is Required Because Court Allowed Government To Reopen Case to The Serious Prejudice of Appellant

A third error that seriously prejudiced appellant and requires reversal, was that the court allowed the Government to reopen its case after defense had rested. The prosecution made the request to reopen the case because of an admitted "lapse" on its part. Tr. 120. The prosecution stated that it wanted to put into evidence information concerning the manner in which the petty cash drawer was divided into departments. Appellant's trial counsel objected to the request but the court permitted the introduction of the evidence.

Allowing the prosecution to put in the evidence, which belonged in its case-in-chief, prevented appellant from being the last to present his case before the jury. This was especially damaging in light of the fact that prosecution used the fact that the petty cash drawer was divided into sections to tie in the coins in appellant's possession to the coins taken in the alleged

larceny. It is true that the court may, in some instances, permit the prosecution to reopen its case. But the trial judge is to exercise extreme care in reopening a case for the introduction of further testimony. Dixon v. United States, 333 F. 2d 340 (5th Cir., 1964). We respectfully submit that in this case, the court did not exercise the care required. Indeed, the court itself expressed doubts about the correctness of what it did. Permitting the prosecution to set forth this evidence right before its summation of its case, on account of a "lapse" by the prosecution, was unfair to appellant. The jury could not help but have the evidence more heavily on its mind when it considered the case. The prosecution, not the defense, should have been made to bear the burden of the prosecution's "lapse." This error seriously prejudiced appellant and requires reversal of the conviction.

Conclusion

For the reasons stated, the judgment of conviction should be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

Jerry H. Brenner
Attorney for Appellant
(Appointed by this Court)

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OTHER REFERENCES

* Cases chiefly relied upon are marked with an asterisk.

III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Must this Court reverse appellant's conviction for housebreaking and petit larceny because of the introduction of two unsolicitated recitations of an alleged accomplice's extrajudicial statement made at the scene of the crime, "Don't shoot, I am coming out," or "I give up, don't shoot me"?

2. Did the trial court properly allow the Government to reopen its direct examination of one witness after defense had presented its case?

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* This case has never been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,227

SWINDELL K. COBLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged, along with one Ezekiel Cunningham and one Rudolph Russ, on August 28, 1967, in a two count indictment for housebreaking (22 D.C. Code § 1801) and petit larceny (22 D.C. Code § 2202). On September 8, 1967 appellant was arraigned and entered a plea of not guilty to both counts. Appellant was tried separately [1]

[1] On the date that appellant's trial commenced, Mr. Cunningham was a fugitive, a bench warrant having been issued on December 15, 1967 and no return executed. Mr. Russ, on March 11, 1968, withdrew his plea of not guilty and entered a plea of guilty before Judge Bryant to the charge of housebreaking.

before a jury and the Honorable William B. Bryant. Trial commenced on March 19, 1968 and was concluded on March 21st, at which time appellant was found guilty on both counts. Appellant was sentenced to a term of three to twelve years by Judge Bryant.

The Trial

At trial the following evidence was adduced: Shortly after 12:00 a.m. on the morning of July 27, 1967, the appellant, along with two other persons, was arrested inside the premises at 6321 Blair Road, N.W., Washington, D.C. (Tr. 19). At this address was a carnival supply store owned by one Sol Cooper and one Emil Lachman (Tr. 46, 47). Appellant's arrest was effected by Private Michael Yanulevich of the Metropolitan Police Department (Tr. 19). A search of appellant conducted by Officer Yanulevich incident to the arrest uncovered a distinctive assortment of small change; i.e., forty pennies, thirty-nine nickles and a single quarter (Tr. 21). Officer Yanulevich had gone to the carnival supply store in response to a police radio run (Tr. 14). Yanulevich testified that upon his arrival at the store, he found to be broken two front windows as well as a glass pane in the front door (Tr. 15, 16). He believed that the damage represented three attempts to break into the premises (Tr. 16, 31). Yanulevich then went into the building where appellant was found and arrested.

Accompanying Officer Yanulevich into the carnival supply store was Detective Thomas Hosie of the Metropolitan Police Department who had similarly responded to the police radio run for a housebreaking at 6321 Blair Road, N.W. (Tr. 31). Detective Hosie was present in the store when Officer Yanulevich arrested and searched appellant (Tr. 37).

Both Officer Yanulevich and Detective Hosie testified that a second individual, Mr. Cunningham, was apprehended in the carnival supply store at the time of appellant's arrest (Tr. 20, 37).

Also present at 6321 Blair Road, N.W., at the time of appellant's arrest were two other police officers; Private David Greenier, who was Officer Yanulevich's partner, and Private James Donahue of the Sixth Precinct. Officer Greenier first went to the rear of the store to check the grounds behind the building (Tr. 82). After making that investigation, Greenier, in the company of Officer Donahue, entered the front of the store (Tr. 82). This was approximately five or ten minutes after he had arrived on the scene (Tr. 82). Officers Greenier and Donahue found Officer Yanulevich and Detective Hosie in the front room of the store having already placed appellant and Cunningham under arrest (Tr. 86, 87). Officers Greenier and Donahue then proceeded to make a search of the rear of the interior of the building, which was the warehouse area (Tr. 87). It was in that area of the store that a third individual, Mr. Russ, was found (Tr. 83, 84, 87). Officer Greenier, describing his search of the warehouse area, testified that he heard movement up on a storage platform (Tr. 83). He was asked by the prosecutor:

> "Officer, after you heard the man moving up there what happened?" (Tr. 84).

Officer Greenier replied:

> "Well he just hollered and he said, I give up, don't shoot me. He said this to Private Donahue as he was going up the ladder. I was covering him as he was going up the ladder." (Tr. 84).

Officer Greenier testified that he first saw Russ when he was coming down the ladder (Tr. 85).

Officer Donahue testified that after about ten minutes of searching (Tr. 87) he found Russ hiding up on the storage platform in the warehouse area. Donahue then was asked by the prosecutor:

> "Did you see Russ up on this ledge?" (Tr. 87).

Officer Donahue answered:

> "There is a ladder there and I started up the ladder and I heard someone say, don't shoot, I am com-

> ing out. And at that time he came down the ladder and it was rather dark there so I brought him out to the front of the building which was the showroom." (Tr. 87).

Mr. Russ was arrested and was found with an equally distinctive assortment of change as was found on the person of appellant. Russ had $6.90 made up entirely of quarters and dimes (Tr. 22, 23).[2]

In addition to the four police officers, the Government called to the witness stand, Mr. Walter Branch, a resident of 200 Tuckerman Street, N.W., Washington, D.C., which address is on the corner of Blair Road about 35 feet from the carnival supply store (Tr. 62). Mr. Branch testified that shortly after 12:00 a.m. on the morning in question, he was awakened by his dog barking (Tr. 74); that he looked out of his window (Tr. 75); that he heard glass breaking (Tr. 75); and that he saw three men enter the carnival supply store at 6321 Blair Road, N.W. (Tr. 76). At that time, Mr. Branch called the police (Tr. 76). According to Branch, the police arrived approximately three minutes after he placed his call to them (Tr. 76).

The Government also presented Mr. Emil Lachman who testified that he was a co-owner of the carnival supply store at 6321 Blair Road, N.W.; that after receiving a call from the Sixth Precinct on the morning in question, he went to his store and found the front windows broken (Tr. 48); that these windows had not been broken when he had last closed his store for business at 5:30 the evening before (Tr. 48, 60); that when he arrived at his store shortly after 12:00 a.m. he noticed that all the change had been removed from his petty cash drawer (Tr. 48); that he had examined that drawer before he had

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[2] Before introduction into evidence of the particular change that was found on Russ, a bench conference was held at which time defense counsel, in answer to Judge Bryant's question, "Is that proper?" (Tr. 22), stated: "I would like all the money in. If, she (the prosecutor) is going to put part of it in, I would rather have the whole amount of it in. I would like to know how much they took off the co-defendants and I want it in there." (Tr. 22).

closed his store, as he did every evening—taking out the bills to be put in a safe, but leaving the change (Tr. 48, 49); and that the currency missing was, in fact, "quarters, nickels, dimes and pennies" (Tr. 49). Mr. Lachman also testified that, although Mr. Russ was an employee of his, he had given neither Russ, nor appellant permission to enter his store (Tr. 52, 53), or his petty cash drawer (Tr. 53). He further testified that he had never given Russ a key to the premises (Tr. 118).

After the Government rested its case, the court entertained, out of the hearing of the jury, a defense motion to have striken from evidence two Government Exhibits; the change taken from the person of appellant, and the change taken from Russ (Tr. 89). After defense counsel made his motion, the court and the prosecutor engaged in a dialogue resulting in the prosecutor requesting permission to recall Mr. Lachman for the purpose of describing the inside of the petty cash drawer. The trial judge found that to be unnecessary. He ruled against the defense motion (Tr. 90, 91).

Mr. Lachman was called by the Government in rebuttal after the conclusion of the defense case (Tr. 117). After being asked several questions on rebuttal, Mr. Lachman was asked by the prosecutor if he could describe the petty cash drawer (Tr. 118). The court intervened before Lachman could answer and, at a bench conference which followed, noted that such a question was not a proper rebuttal question (Tr. 120). The prosecution was granted permission, however, to reopen its direct testimony of Lachman for the limited purpose of having him describe the petty cash drawer.[3] Appellant's trial counsel was permitted to cross examine Lachman after this new testimony, and he did so (Tr. 122).

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[3] The prosecutor at the bench conference stated:

> "In my argument I am going to say that one man had nickels and pennies and the other had nickels (quarters?) and dimes and, therefore, the change was arranged separately in the drawer." (Tr. 119).

[Footnote continued on page 6]

Swindell K. Coble testified in his own behalf. His testimony was, in essence, that he went from the District of Columbia to a restaurant in Maryland with Cunningham and Russ (Tr. 98); that the three did some drinking and that later in the day they decided to walk back into the District to the carnival supply store where Russ worked (Tr. 98). When they got to the store, Russ asked appellant if he would "help him check the place out?" (Tr. 98, 99). Appellant testified that the purpose of going into the store was that Russ "had some money out there." (Tr. 99). Appellant testified that he had not noticed either the two broken front windows or the broken glass in the front door through which he stated he had entered the premises (Tr. 108, 112). He testified that immediately after going inside, the store was surrounded by police (Tr. 99). Finally, appellant testified that the change with which he was found had been earned from work, from selling wine, from gambling and from shooting craps (Tr. 98).

The jury on the evidence adduced above found appellant guilty on both counts charged.

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[3] [Continued]

"It is obviously a fact that one of them took money from one part of the drawer and the other took money from the other part of the drawer." (Tr. 119, 120).

". . . Yesterday afternoon, if your Honor will recall, this was at the end of the Government's case, I asked permission to recall Mr. Lachman at that point . . ." (Tr. 120).

The Court asked:

"Do you want to re-open your direct testimony with this man? (Tr. 120).

The prosecutor answered:

"Yes." (Tr. 120).

After objection by defense counsel, the Court stated:

". . . I will let him testify as to the actual arrangement." (Tr. 120).

ARGUMENT

I. A. The introduction of two unsolicitated recitations of an alleged accomplice's extrajudicial statement made at the scene of the crime was not error, the statement being admitted properly as an exception to the hearsay rule.

(Tr. 17, 19-23, 28, 31, 34, 48-49, 55, 76, 83-84, 87)

Introduction at trial of two versions of what appears to have been a single statement made by an alleged accomplice of appellant was not error. The statement was related first by Officer Greenier as part of an answer not wholly responsive to a question of the prosecutor. Officer Greenier had been relating the facts of his search of the premises in question when the prosecutor asked:

> "After you heard the man moving up there what *happened?*" (Tr. 84). (Emphasis supplied.)

Officer Greenier answered:

> "Well he just hollered and said, I give up, don't shoot me. He said this to Pvt. Donahue as he was going up the ladder. I was covering him as he was going up the ladder." (Tr. 84).

A few minutes later the next witness, Officer Donahue, was called to the stand by the Government. He recalled the statement differently. His answer which contained the recitation of the statement was also unresponsive to the question asked of him by the prosecutor. He was asked:

> "Did you *see* Russ up on this ledge?" (Tr. 87). (Emphasis supplied.)

Officer Donahue responded:

> "There is a ladder there and I started up the ladder and I heard someone say, don't shoot, I am coming out. And at that time he came down the ladder and it was rather dark there so I brought him out to the front of the building which was the showroom." (Tr. 87).

The prosecutor's questions were in no way couched so as to illicit a response containing recital of an extrajudicial remark. Nevertheless, the statement, in either or in both versions, was admitted properly under a well recognized exception to the hearsay rule. The statement was apparently "hollered" (Tr. 84) by a young man who was trapped on a storage platform some ten feet above the floor (Tr. 87) in the darkened (Tr. 87) warehouse area of the carnival supply store as he was suddenly confronted by police officer Donahue as that officer started up the ladder which led directly to the young man's hiding place. The statement can be labeled an "excited utterance." The law accepts such a statement made under such circumstances as being reliable and therefore removes it from the broad class of inadmissible hearsay.

> "From the midst of *res gestae* there has emerged, under Wigmore's discerning analysis, an exception to the hearsay rule for statements uttered under stress of excitement produced by a startling event and made before the declarant has had time or opportunity to reflect or contrive. The factor of special reliability is thought to be furnished by the excitement which suspends the power of reflection and fabrication." *McCormack on Evidence*, § 272 (1954 ed.).

See *Beausoleil* v. *United States*, 71 U.S. App. D.C. 111, 107 F.2d 292 (1939); *Jackson* v. *United States*, 123 U.S. App. D.C. 276, 359 F.2d 260, *cert. denied*, 385 U.S. 877 (1966).

B. Even assuming error, there having been raised no objection at trial, appellant cannot now for the first time be heard by this Court, the two recitations of the extrajudicial statement not constituting "Plain Error" under Rule 52(b), Fed. R. Crim. P.

The two recitations of the extrajudicial statement, even if erroneously admitted, did not affect any "substantial right"[4] of appellant and may be disregarded by this

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[4] Rule 52(a), Fed. R. Crim. P.

Court, no objection having been raised below. This Court, in *Serio* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (1968), noted that "(h)ad *Bruton* been decided when Serio was tried we assume that the LaShine confession would have been objected to by Serio. In that event, the latitude available to the court under Rule 52(b) in the absence of objection could not have been relied upon by the court." [5] The instant case, however, is distinguishable from *Serio* in at least two important aspects. First, unlike Serio, who was tried jointly with LaShine, appellant was not seated "side by side" with his alleged accomplice, Russ. Second, the statement in question in the case at bar is wholly different from the confession that apparently was involved in the *Serio* case. Here, no confession was read to the jury with appellant's name striken out and the words "another man" inserted instead, as was done in *Serio*. *Serio* v. *United States*, *supra*, does not compel this Court to hear appellant's objection, raised before it for the first time.

1. ***The statement, in either form, does not resemble those condemned by* Bruton *or by* Sims.**

The statements which were considered in *Bruton* v. *United States*, —— U.S. —— (1968), as well as those considered in *Jones* v. *United States*, 119 U.S. App. D.C. 284, 342 F.2d 863 (1964); *Greenwell* v. *United States*, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964), *cert. denied sub nom Greenwell* v. *Anderson*, 380 U.S. 923 (1965); *Oliver* v. *United States*, 118 U.S. App. D.C. 302, 335 F.2d 724 (1964), *cert. denied sub nom Crump* v. *United States*, 379 U.S. 980 (1965); and *Kramer* v. *United States*, 115 U.S. App. D.C. 50, 317 F.2d 114 (1963), all shared similar characteristics: (a) the statements were all admissions to the police of both the confessor *and the non-confessor's* complicity in a series of criminal acts; (b) the

[5] The case at bar came to trial in March of 1968 and, like *Serio* v. *United States*, *supra*, was tried before the Supreme Court decided *Bruton* v. *United States*, —— U.S. —— (May 20, 1968).

statements either named the co-defendant or referred to him under circumstances which left little doubt about his identity; and (c) the statements were confessions given to police *after* the confessor had been apprehended, and thus there was at least some motive for falsification. Additionally, in *Bruton*, *Jones*, and *Greenwell*, the confessions which implicated the co-defendant were held to be inadmissible against the confessor. Finally, each of these cases involved a joint trial of at least two defendants. The statement involved in the instant case shares absolutely none of the above characteristics.

The statement in question in the instant case is similarly distinguishable from the host of statements considered by this Court in *Sims* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (1968). *Sims* involved the introduction of statements which required the trial judge, on no less than 15 separate occasions, to give cautionary instructions to the jury regarding the scope of their admissibility. *Sims*, like *Bruton*, but unlike the case at bar, involved a trial of co-defendants. *Sims*, like *Bruton*, but unlike the instant case, involved statements some of which were clearly inculpatory as to the declarant or confessor and often damaging to the silent or non-confessing co-defendant as well. The statement in the instant case is not clearly inculpatory even as to the declarant and, of course, makes no reference whatsoever to anyone other than the declarant.

The statement, as recited by Officer Donahue, ". . . don't shoot, I am coming out," (Tr. 87) is one which is more consistant with innocence than with guilt. It incorporates no inferences of wrongdoing and is in no way incriminating against the declarant much less against appellant.

The statement, as related by Officer Greenier, "I give up, don't shoot me," (Tr. 84) is one which is as consistant with innocence as with wrongdoing, and is as nearly free of self-incrimination as was the first recitation. Neither version of the statement appears to be either a confession as in *Bruton* v. *United States*, *supra*,

or an inculpatory statement as in *Sims* v. *United States*, *supra*. Neither recitation of the statement in any way mentions, refers to or incriminates appellant.

In *Calloway* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (1968), two defendants were jointly tried, and incriminating statements of one co-defendant were introduced at trial. This Court held that the introduction of such statements was proper where they contained no references to the other co-defendant. This Court stated: "(T)he statements did not link the appellants and consequently did not prejudice them."

The statement in the case at bar, in either version, is at best, innocuous casting no light of wrongdoing on either the declarant, Russ, or upon appellant. At worst, the statement is incriminating only against its maker, Russ, but not linking the declarant with appellant. Even if a statement is found to be incriminating against the declarant, *Calloway* v. *United States*, *supra*, stands for the proposition that it may nevertheless be admitted in a joint trial where it does not link appellants. In the instant case, where the declarant and appellant were not even tried jointly, did not sit side by side before the jury, the danger of prejudice to appellant from the admission of such a statement is even less than it was to Calloway.[6] It is submitted that, in fact, no prejudice whatsoever attached to appellant as a result of admitting the two versions of an alleged accomplice's statement made at the scene of the crime.

2. *Any error there may have been was harmless beyond a reasonable doubt.*

Assuming, *arguendo*, that one or both of the recitations of the statements were erroneously admitted, the Govern-

[6] Appellant argues, at p. 10, n. * of his brief, that cross-examination was essential to explore the possibility that the statement may never have been made. The declarant, Mr. Russ, his case already having been disposed of by plea (see Counterstatement, *supra*), was available as a witness for defense to affirm or deny the existance of the statement. He was never called by appellant.

ment must establish that such error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). That burden can be met in the instant case. Evidence of appellant's guilt is overwhelming and precludes any possibility of prejudice having been suffered by appellant as a result of the introduction of the extrajudicial statement of the alleged accomplice. The evidence against appellant has been reviewed at the outset of this brief. It showed, *inter alia*, that appellant was arrested *inside* the premises in question (Tr. 19, 34): that he was arrested there within minutes after three men had been seen entering the premises shortly after midnight (Tr. 28, 31, 76); that two other persons were arrested in the premises (Tr. 20); that appellant was found with a distinctive assortment of change on his person (Tr. 21); that the petty cash drawer in the premises was found empty (Tr. 48, 49), although it had contained such change earlier in the evening (Tr. 48, 49, 55); that two front windows and a glass pane in the front door of the premises were found broken at the time of appellant's arrest (Tr. 17), though neither of those windows nor the door had been broken at closing time earlier in the evening (Tr. 48); and that appellant had never been given permission to enter either the premises in question or the petty cash drawer located within that building (Tr. 52). The evidence against appellant could hardly have been more forceful. Under these circumstances, if any error was committed by admitting either or both of the versions of the statement of appellant's alleged accomplice, it was harmless error beyond a reasonable doubt.[7]

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[7] It is important to note that the prosecutor made no mention of the statement at any time during the course of the trial; it was not argued or suggested to the jury as being any evidence whatsoever against appellant.

II. The trial court did not abuse its discretion in allowing the Government, after defense had rested, to reopen its direct examination of a single witness for a limited purpose.

(Tr. 46-50, 52, 53, 60, 89-91, 117-122)

After appellant presented his defense at the trial below, the prosecutor recalled two witnesses in rebuttal (Tr. 116, 117). The second of these witnesses was Mr. Emil Lachman, an owner of the carnival supply store in which appellant was arrested (Tr. 117 *et seq.*). Mr. Lachman was asked a proper rebuttal question and was then cross-examined by defense counsel. The prosecutor then asked Lachman a question regarding the petty cash drawer that had been the target of the larceny:

> The prosecutor: "Mr. Lachman, can you described the petty cash drawer?" (Tr. 118).

Before Lachman could answer that question the trial judge intervened, and the following colloquy took place:

> The Court: "Wait a second now. Is this proper rebuttal?" (Tr. 118).
> The prosecutor: "I submit it is. May we approach the bench?" (Tr. 119).
> The Court: "You may." (Tr. 119).

At the bench conference which ensued, the trial judge ruled that questions about the petty cash drawer were not proper rebuttal questions, but allowed the prosecution to re-open its direct testimony.

> The prosecutor (still at the bench): "It is a lapse on my part. I thought he had testified that the drawer was arranged into compartments." (Tr. 119).
> The Court: "Do you want to re-open your direct testimony with this man?" (Tr. 120).
> The prosecutor: "I would like to." (Tr. 120).
> The Court: "For that purpose?" (Tr. 120).
> The prosecutor: "Yes." (Tr. 120).

* * * *

> The prosecutor: "If the Court will recall I did request permission to do this before the defendant testified." (Tr. 120).
>
> The Court: "I understand that and I denied it because it was superfluous really. I will let him testify as to the actual arrangement." (Tr. 120).

Mr. Lachman did so testify (Tr. 121, 122) and, thereafter, defense was given the opportunity to cross-examine the witness, which it did (Tr. 122).

Under these circumstances, the court did not abuse its discretion in permitting the prosecution to re-open its case.

> "It is within the sound discretion of the trial court to re-open a case and receive additional evidence." *Simsirdag* v. *United States*, 315 F.2d 230, 231 (5th Cir. (1963).
>
> "Most . . . cases in which the parties are permitted to re-open involve an omission 'through mere inadvertance." *Dixon* v. *United States*, 333 F.2d 348, 353 (5th Cir. 1964) (citing *Simsirdag* v. *United States*, *supra*).

In the instant case, the "lapse" on the part of the prosecutor can be compared to the "omission through mere inadvertance" involved in *Simsirdag* v. *United States*, *supra*, in which the Fifth Circuit Court of Appeals allowed the Government to re-open its case.

This Circuit has taken a similar position, and has stated:

> "Such a matter (allowing the prosecution to re-open its case) is undoubtedly within the discretion of the trial court." *Morgan* v. *United States*, 111 U.S. App. D.C. 127, 294 F.2d 911, *cert. denied*, 368 U.S. 978 (1961).

See, *Smith* v. *United States*, 70 U.S. App. D.C. 255, 105 F.2d 778 (1939).

In addition, "appellant makes no showing of any deprivation of rights or of an opportunity to defend caused by the alleged irregularity, and that is the kind of preju-

dice he must show to sustain a claim of abuse of discretion by the trial judge." *Morgan* v. *United States, supra,* at 913. No showing of such prejudice has been made by appellant in this case, and the trial judge has not been shown to have abused, in any manner, his discretion in allowing the re-opening of the Government's case.[8]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[8] Appellant raises a third argument which, in essence, is that he suffered prejudice because the trial judge stated at one point during the trial that the testimony of a particular Government witness was "important". What the trial judge actually said was: "Mr. Branch, seriously your testimony is important and the man who is the farthest from you over here in this jury box would like to hear you. . ." (Tr. 73, 74).

Appellant's argument is wholly without merit. On at least two occasions prior to this statement and on two occasions after the statement by the judge was made, the trial judge and the prosecutor made efforts to insure that Mr. Branch (who was standing by a blackboard on which he had drawn a diagram—not sitting in the witness chair) could be heard by the entire jury (Tr. 72, 73, 74).

In view of the obvious problems the trial court and the prosecutor were having with the witness keeping his voice up, the trial judge's use of the word "important" is more reasonably seen as part of the effort to encourage the witness to speak loudly, than as an endorsement of the credibility of his testimony.

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